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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931.

SOUTHERN RAILWAY COMPANY,
a Corporation,
Petitioner,

vs.

EDWARD WALTERS, a Minor, by
HERMAN WALTERS, His Father
and Next Friend,
Respondent.

No. 52.

On Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

RESPONDENT'S BRIEF.

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RESPONDENT'S BRIEF.

STATEMENT.

This suit originated in the United States District Court for the Eastern District of Missouri, and upon trial before Honorable C. B. Faris, District Judge, and a jury resulted in a verdict for the plaintiff in the sum of $43,000. A motion for a new trial was duly and timely filed and the Court ordered that the motion for a new trial be overruled provided the plaintiff would remit the judgment

down to $28,000. In due time plaintiff remitted $15,000, whereupon a new judgment in the sum of $28,000 was entered and defendant's motion for a new trial was overruled. Thereafter and in due time defendant perfected its appeal to the United States Court of Appeals for the Eighth Circuit, which Court affirmed the judgment of the lower court. Thereafter certiorari was applied for and in due course issued by this Court, and in obedience to the writ of certiorari heretofore granted by this Court the case now comes on to be heard.

The plaintiff, a minor, who at the time of his injury was 5 years old, was struck by one of the petitioner's trains in East St. Louis, Illinois, and seriously and permanently injured. The petition upon which the case was tried charged that the defendant was negligent, in that it violated a ruling of the Illinois Commerce Commission requiring that all trains, before passing over the crossing where plaintiff was injured, must come to a stop, and one of the crew thereof shall be required to flag said crossing and warn all persons attempting to cross said crossing of the approach of the train. This is the sole assignment of negligence upon which the case was submitted to the jury, and the plaintiff's evidence tends to prove that after he was discharged from school he proceeded across said tracks in an eastwardly direction when he was struck by the forward end of a northbound train. The evidence further tends to show that said train did not stop before proceeding across said Bond avenue crossing, nor did any

member of the crew thereof flag the crossing as required by the ruling of the Illinois Commerce Commission.

Inasmuch as one of the points now being urged before this Court is that there was not substantial evidence warranting the submission of this case to the jury we shall briefly comment upon the testimony for the purpose of showing to the Court that there was in fact substantial evidence and that the trial judge was fully justified, under the law, in submitting the case to the jury.

Corda Pettit, the first witness offered by the appellee, testified that she was driving west on Bond avenue toward the railroad track and that, as they approached the track, the automobile was stopped to let the train go by; that as they reached the intersection the engine had just crossed Bond avenue (Tr., p. 25). She also testified that she did not see the train stop before crossing Bond avenue, and that if it had stopped she believed she would have noticed it (Tr., p. 30).

Mrs. Edith Odell, witness for appellee, testified that she was driving the automobile in which Mrs. Pettit was a passenger, and before reaching the railroad track she observed the train (Tr., p. 34). When she first saw the train it was about 75 or 100 feet south of the Bond avenue crossing and proceeding in a northwardly direction (Tr., pp. 40-41); that she saw no men on any part of the engine or tender (Tr., p. 39). Witness further testified that she was about 75 feet from the crossing when she first ob-

served the train (Tr., p. 43), and that when she observed the train coming northwardly on the tracks she brought her automobile to a stop so as to permit the train to get by ahead of her (Tr., p. 34), and that after two or three of the cars had passed over the crossing she saw the boy on the opposite side of the train, lying in the street (Tr., p. 35).

Thomas Heher, another witness for appellee, testified that he had stopped at a filling station to buy some gasoline and that his attention was attracted by the scream of a woman and that he saw appellee under the train (Tr., p. 45); that he is familiar with the speed of moving vehicles and that, in his opinion, at the time he observed the train it was proceeding at a rate of speed of about 10 miles per hour, and that before hearing the woman scream he did not hear any bell or whistle sounded (Tr., pp. 52-3).

John McKenzie, a witness for the appellee, testified that he was a salesman for the Liberty Bell Oil Company, and that he had driven his automobile across the Free Bridge, and that he tried to go up several streets but was cut off by the train, and that the train was moving and he tried to get around it (Tr., p. 61); that Tenth street runs right off of the Free Bridge, and that as he left the Free Bridge he drove north on Tenth street; that there are three or four streets which run east and west from Tenth street at that place; that he intended to go to the Mississippi Warrior Service under the Free Bridge; that he intended to

turn west down the first street, but that he observed a train moving north and, upon reaching the next street, intending to turn west, he saw the same train moving north; and with reference to the next street he also looked west and observed the same thing, namely, the moving train, and that when he reached the next street, which was Bond avenue, he turned west into said street, and that, after turning west into Bond avenue, he observed the hind end of the engine as it had just crossed Bond avenue (Tr., pp. 62-63). Witness further testified that, after getting up to the train, he saw the boy lying in the street on the opposite side of the train.

Witness further testified that the train was moving at all times after he first observed it when he attempted to turn west at the first street after leaving the Free Bridge, and witness positively testified that it never stopped at any time after he first observed it until it had passed over the Bond avenue crossing (Tr., pp. 64-65). Witness further testified that when he first turned west into Bond avenue the hind end of the engine had just crossed Bond avenue, and that as he was driving two blocks west on Bond avenue to reach the tracks about ten or fifteen cars had passed over the intersection, and that it is his opinion that he was moving at a rate of speed of fifteen miles per hour (Tr., pp. 66-67).

Ruth Sheeley, witness for appellee, testified that she was a pupil at the Franklin School, age 11 years, and in the

fifth grade; that on March 3, 1927, in the afternoon, she observed some little boys who had just gotten out of school coming along Bond avenue, some of whom were running; that the train was coming and that about three or four of the little boys got across the track, but that the plaintiff did not; that they were going away from school; that the school is on the west side of the tracks, and that the plaintiff was hit by the engine and knocked on the track, and a man came along and picked him up and drug him out from under the train (Tr., pp. 73-74).

Witness testified that at the time she saw the foregoing she was standing on a landing right as you come into the door of the school building, and that she was looking toward the railroad tracks out of the doors, and that she was watching the little boys running along the sidewalk off the west side of the track, and that when she saw them they were at the end of the sidewalk on the west side where it ends, just where the tracks cross (Tr., pp. 80-81).

Witness further testified that there was a solid board fence between her and the railroad track, and that in that fence there was what was known as a teachers' gate, but that the gate was open and she could see through the gate and see the boys on the sidewalk, but that if the gate were closed she could not have seen them (Tr., p. 77).

Witness testified that there was glass in the doors of the school building through which she was looking (Tr., p. 88), and that the level of the landing on which she was standing was higher than the school yard (Tr., p. 91). In

referring to the teachers' gate in the board fence the witness testified that it was down, that is, hanging on the bottom hinge, but that the janitor thereafter fixed it (Tr., pp. 76, 91). Witness further testified that there was no bell or whistle sounded and that the train did not stop (Tr., p. 79).

Witness further testified that the train was traveling north; that when she first saw the train it was about half a block south of the plaintiff, and that at that time the plaintiff was on the sidewalk on Bond avenue, west of the tracks; that she saw the train coming; that she was looking out of the glass in the doors.

James Goodwin, a witness for appellee, testified that he was leaning against a post and saw four boys start to cross the tracks, all of whom were running except the plaintiff, and that as plaintiff was crossing the tracks a train hit him and threw him back (Tr., p. 94); that he heard no bell or whistle sounded; that the three boys who ran got across the track ahead of the train (Tr., p. 104).

Edward Walters, the plaintiff, testified that he was a pupil in the Franklin School on the date of the accident; that he had been going to school about two or three weeks before the accident; that he lived east of the railroad tracks, and that in going to and from school he had to cross over the railroad tracks (Tr., pp. 105-111); that on the day of his injury he and some other boys were going

home from school, and that the other boys were running, but that he was walking, and that he did not see the train before he started across the tracks (Tr., pp. 108-109). Plaintiff further testified that when he first saw the train it was about a half of a block away, and that the front part of the engine struck him (Tr., pp. 110-111).

Benjamin F. Ward, witness for appellee, testified that he operated a filling station about seventy-five feet from the place where this accident occurred and that his attention was attracted by the scream of a woman and that when he looked in the direction of the scream he observed that the engine and one or two cars had passed over the Bond avenue crossing (Tr., p. 119), and that when he observed the moving train it was moving at a rate of speed between twelve and fifteen miles per hour (Tr., p. 122). Witness further testified that he did not observe the train stop at any time and that the appellee was lying near the west rail of the northbound track about six and one-half feet north of the sidewalk on Bond avenue (Tr., p. 121). Witness further testified that the schoolhouse sets up on a terrace, and that the sidewalk gradually goes up to it, and from the sidewalk up to the building there is a rise of about two feet (Tr., p. 124).

The appellant offered the testimony of several witnesses, who, it appears, comprised the crew of the train which struck the plaintiff; these witnesses, namely, G. W. Lane, Harvey Knight, John Luscomb, John R. Stewart, W. W.

Woodside and Charles G. Elmore, all present employes of the appellant, testified that the train did stop before crossing Bond avenue and that two short and two long blasts of the whistle were sounded and that two members of the crew were standing on the footboard of the tender (the foremost part of the engine as it was traveling northwardly); that one member of the crew went out ahead of the engine when it had stopped for the crossing and that none of the crew saw the boy hit nor knew of the happening of the accident until about two hours later.

John Lusqomb, the engineer in charge of the train, testified that it would require from three to five minutes running time in order to build up a speed of five or six miles an hour from a dead stop under the conditions there present (Tr., p. 163).

Rawlins Guthrie, witness for the appellant, testified that he is an engineer and is in the appellant's employ and was so employed in March, 1927, and that on March 10, 1927, or about a week after the accident, he prepared a drawing of the neighborhood of Eighth street and Bond avenue, which was introduced in evidence and appears at page 201 of the transcript. Witness further testified that there was a solid board fence in the school yard. This witness did not testify at the former trials of the case.

At the conclusion of the evidence the Court submitted the case to the jury in the following language:

"It is charged that the defendant here did not comply with that order, and that its failure to comply with that order caused the hurt of the plaintiff here. I say to you, as a matter of law, that the defendant was required to comply with that order. If it did comply with that order, then it was not guilty of negligence, and you cannot find against it. If it did not comply with that order then it was guilty of negligence, and you are warranted in finding for plaintiff, because of its failure to comply, for the simple reason that its failure to comply would constitute negligence. The question then for you is upon that point, the decisive question in this case: Did it comply? If it did, find for the defendant; if it did not, find for the plaintiff. That is all there is to this case, gentlemen."

POINTS AND AUTHORITIES.

I.

Inasmuch as there was substantial evidence to the effect that the train did not stop before proceeding across the Bond avenue crossing, and also that the plaintiff was struck by the train while attempting to cross in front thereof, the trial court properly overruled defendant's motion for a directed verdict and the ruling of the Circuit Court of Appeals sustaining the trial court was thoroughly justified.

Hardy Mining Co. v. Baker, 10 Fed. (2d), l. c. 279;
Crookston Lumber Co. v. Boutin, 149 Fed. 680;
U. S. F. & G. v. Blake, 285 Fed. 449;
Goldsmith v. Insurance Company, 114 Fed. 914;
Bergert v. Paine, 274 Fed. 784;
Gumming v. Cooley, 281 U. S. 90.

II.

The trial court properly exercised its discretion in overruling defendant's motion for a new trial.

Paine v. Stock Yards Company, 28 Fed. (2d) 463;
Holmgren v. U. S., 217 U. S. 509;
Mattox v. U. S., 146 U. S. 140;
United Press Company v. Association, 254 Fed. 284, 248 Fed. 483;
Vallery v. Irrigation Company, 248 Fed. 483 (8th Circuit);

Henderson v. Moore, 9 U. S. 5;
Newcomb v. Wood, 97 U. S. 581;
Hays v. Stine, 289 Fed. 224 (4th Circuit);
Yellow Cab Company v. Earle, 275 Fed. 928 (8th Circuit);
Ellerd v. Griffith, 29 Fed. (2d) 402 (9th Circuit);
Gajda v. Dairy Company, 18 Fed. (2d) 279 (6th Circuit);
Weed v. Petroleum Company, 300 Fed. 1005 (see, also, 294 Fed. 725, same case);
Spiro v. Felton, 78 Fed. 578 (6th Circuit);
Stewart v. Railroad Company, 229 Fed. 862;
Plummer v. Mining Company, 55 Fed. 755;
Pringle v. Guild, 119 Fed. 962;
Reeve v. Dennett, 137 Mass. 315.

(A) There is no competent evidence of record from which this Court can conclude that the trial judge has been guilty of manifest abuse of discretion.

(B) The comments made by the trial judge preliminary to overruling petitioner's motion for a new trial (set out at pages 206-210) constitute no part of the record and cannot be considered by this Court incident to a determination of this case.

Rector v. Askely, 6 Wall. 142 (73 U. S. 753);
Williams v. Norris, 12 Wheaton 116;
Gibson v. Chouteau, 8 Wall. 314 (75 U. S. 317);
England v. Gebhardt, 112 U. S. 502;
Johnson v. U. S., 160 U. S. 546;
Nolker v. Nolker, 226 S. W. 304 (Mo. Supreme);
Joblin v. Surety Co., 193 Mo. App. 132;
Mead v. Spaulding, 94 Mo. 43.

ARGUMENT.

I.

There is no dispute as to the law concerning directed verdicts in federal courts—that is, the necessity that there be substantial evidence in support of plaintiff's case.

Now, for the purpose of determining whether the plaintiff made out a case for the jury, it is necessary to consider the pleadings and the evidence.

The only assignment of negligence submitted to the jury was the failure on the part of the defendant to stop its train before proceeding across the Bond avenue intersection. Now, in order to meet this situation of the pleadings, it was necessary for the plaintiff to show, by substantial evidence, **first**, that the train did not stop at the crossing, and **second**, that he was struck by the train while attempting to cross in front thereof. At this point it may be well to observe that the engine which was pulling this train was coupled to the cars in reverse fashion—that is, that the front of the engine was headed south and the tender of the engine was headed north, the direction in which the train was traveling. (See photograph at page 211 of the transcript, Defendant's Ex. 3.)

In our statement of facts in this brief we have briefly set out the testimony of the several witnesses offered by the plaintiff, which we feel clearly indicates that the plaintiff has offered substantial evidence in support of the as-

signment of negligence upon which the case was submitted to the jury.

Plaintiff's witness **Pettit**, who was in a position to know, testified that she did not see the train stop before proceeding across the Bond avenue intersection.

Witness **Edith Odell** was driving her automobile toward the railroad tracks, and testified that when she was about seventy-five feet from the crossing the northbound train was about seventy-five feet south of Bond avenue, and that she stopped her automobile to permit the train to get by. If the train had stopped there would have been no occasion for this woman to have stopped her automobile to have permitted the train to have crossed ahead of her.

Petitioner's engineer, **John Luscomb**, testified that it would require from three to five minutes running time in order to build up a speed of five or six miles an hour from a dead stop (Tr., p. 163). This testimony is important in view of the fact that **Thomas Heher** testified that the train, in passing over the crossing, was moving at a rate of speed of about ten miles per hour, whereas **Benjamin Ward** testified that it was moving at a rate of speed between twelve and fifteen miles per hour. The engineer testified that it would have required three to five minutes of running time in order to build up a speed of as much as six miles per hour, and if the testimony of the witnesses as to the rate of speed is to be believed, then, under the physical facts, the engineer of the train did not, and could not, have stopped same before starting across the inter-

section. This is substantial evidence, and this, coupled with testimony of the witnesses **Cordia Pettit, Edith Odell** and **John McKenzie**, that the train did not stop, constitutes substantial evidence as to this element of the case. Now, as to the other necessary element, to wit, that the plaintiff was struck by the train while attempting to cross in front thereof, we have the testimony of the plaintiff himself, corroborated by **Ruth Sheely** and **James Goodwin**, all eyewitnesses to the accident and in position to give direct and first-hand information as to what they saw. This certainly constitutes substantial evidence. Of course, the credibility of these witnesses, and the weight to be given to their testimony, are questions for the jury.

We feel that the opinion of the Circuit Court of Appeals, written by Hon. Circuit Judge Gardner, so ably sustains the conclusion reached by it in upholding Judge Faris in his decision denying the petitioner's motion for a directed verdict that, rather than to indulge in further argument, we will adopt this in support of our contention and as our argument why the petitioner's motion for a directed verdict was properly denied.

As indicated at the outset, there is no dispute as to the law, viz., that there must be substantial evidence to warrant the submission of the case to the jury, consequently we shall not indulge in any extended discussion of the cases.

In Crookston Lumber Company v. Boutin, 149 Fed. 680 (8th Circuit), the Court said:

"A question of law always arises at the close of the evidence * * * whether there is any substantial proof warranting a verdict in favor of the plaintiff. In determining such question all of the evidence and reasonable inferences therefrom must be considered in the light most favorable to the plaintiff."

In the case of **Bergert v. Payne, 274 Fed. 784 (6th Circuit)**, the following language was used:

"A verdict cannot properly be directed for the defendant merely because the trial judge feels that, should the jury find in plaintiff's favor, he would regard it as his duty to set the verdict aside; the test is whether there is such an utter absence of substantial evidence as to make it his duty, as a matter of law, to set the verdict aside, independent of the exercise of discretion and without reference to how great the Court may think the conflict in the testimony to preponderate in defendant's favor."

In the Bergert case the trial judge, incident to sustaining plaintiff's motion for a directed verdict, stated that he did not believe the plaintiff's testimony and that if the case were submitted to the jury and it returned a verdict in plaintiff's favor he would feel it his duty to set the verdict aside. The Appellate Court reversed the case and remanded it with directions to submit the issues of fact to a jury for determination.

Again, in the case of **Hardy Mining Company v. Baker, 10 Fed. (2d), l. c. 279**, the Court said:

"We are convinced that there was evidence sufficient to support findings that there was gas in the mine; that the defendant knew it and was negligent in permitting it to be there. It may be that upon the printed record the weight of the evidence on these questions is very strongly against the plaintiff; upon that we intend to express no opinion, because that is a question for the jury."

This Court in the recent case of **Gunning v. Cooley, 281 U. S. 90**, had the following to say:

"The decisions establish a more reasonable rule, 'that, in every case, before the evidence is left to the jury there is a preliminary question for the Judge, not whether there is literally no evidence, but whether there is any evidence upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.' Issues that depend on the credibility of witnesses and the effect of weight of evidence are to be decided by the jury. And in determining a motion of either party for a peremptory instruction the Court assumes that the evidence for the opposing party proves all that it reasonably may be found sufficient to establish, and that from such facts there should be drawn in favor of the latter all the inferences that fairly are deducible from them."

In the Gunning case the evidence was, indeed, much closer than it is in the instant case on the question of negligence. However, in that case the Court held that there was some evidence to support plaintiff's case, and that the

question of the weight and credibility thereof was for the jury and not for the Court.

From the foregoing authorities we submit that, inasmuch as there was substantial evidence to prove the plaintiff's case, the Court very properly submitted the case to the jury, it being the province of the jury to weigh the evidence and to pass upon its credibility.

We, therefore, respectfully submit that the trial judge properly overruled appellant's motion for a directed verdict and rightfully submitted the case to the jury for determination on the disputed facts.

II.

The appellant contends that, even if this Court should decide that the petitioner's motion for a directed verdict was properly ruled, that the trial judge, notwithstanding, was bound to sustain the motion for a new trial on the ground that the verdict was against the weight of the evidence, and that his failure so to do was a manifest and patent abuse of discretion and the commission of an arbitrary and unwarranted judicial act. Inasmuch as the appeal in federal cases is not from the action of the Court in ruling on the motion for a new trial, the motion for a new trial is not a necessary part of the appeal as is the case in our state procedure.

However, in the early cases of **Henderson v. Moore, 9 U. S. 5**, and **Newcomb v. Wood, 97 U. S. 581**, this Court

held that the allowance or refusal of a new trial was in the sound discretion of the Court to which the application is addressed and that the result could not be made the subject of review by writ of error.

This rule was followed by this Court in the later case of **Mattox v. United States, 146 U. S. 140,** and in the still later case of **Holmgren v. United States, 217 U. S. 509.**

Subsequently the courts of appeal of the various circuits modified this rule by permitting appellate courts to review the conduct of trial judges incident to motions for new trials, where it was patent and manifest that the trial judge was arbitrary in his action and ruling. Inasmuch as the granting of a motion for a new trial rests within the sound judicial discretion of the trial judge, naturally this discretion cannot be reviewed, and unless there is positive and convincing evidence that the trial judge was arbitrary in his ruling the Appellate Courts would and should not interfere. Naturally, the Appellate Courts have always held to the presumption that the trial judge did not abuse his judicial discretion.

At this point we urge that there is absolutely no competent evidence or testimony in the record before this Court to justify a holding that the action of the trial judge was arbitrary and constituted an abuse of his judicial discretion.

In support of their contention that the trial judge abused his judicial discretion petitioner refers to the comment of the trial judge uttered before and preliminary

to his ruling on the motion for a new trial. (This comment is set out at pages 206-10 of the transcript.)

We respectfully submit that this comment is no part of the record and cannot be considered by this Court in a determination of this case.

This Court has held for a great many years that comments and opinions of lower courts do not constitute evidence and cannot be considered as such by the appellate courts.

In **Rector v. Askely, 6 Wall. 142 (73 U. S. 753)**, this Court said:

> "The opinion of the State Court constitutes no part of the record and cannot be looked to as the foundation on which this Court will take or refuse jurisdiction."

In the case of **Williams v. Norris, 12 Wheaton 116**, this Court again said:

> "The opinion of the Court or the reasons given for its judgment form no part of the record within the meaning of the twenty-fifth section, nor are they part of the record in Tennessee by the local law of that state requiring the Judges to file their opinions in writing among the papers of the cause."

The same ruling was made in the case of **Gibson v. Chouteau, 8 Wall. 314 (75 U. S. 317)**.

Still later, in the case of **England v. Gebhardt, 112 U. S. 502**, this Court said:

"The opinion of the court below is no part of the record. Our rule 8, section 2, requires a copy of any opinion that is filed in a cause to be annexed to and transmitted with the record, on writ of error or appeal to this Court, but that of itself does not make it a part of the record below."

And even still later, in the case of **Johnson v. United States, 160 U. S. 546, l. c. 553,** this Court said:

"It is true mention is made in the opinion of the Court of claims of the time of his taking out his first papers, but we cannot act upon any such statement."

In this case the Court, following the ruling in the England case, held that the opinion of the court below is no part of the record upon which the case can be determined in the Supreme Court.

The same rule of law has been followed in the State of Missouri in the cases of **Joblin v. Surety Company, 193 Mo. Appeal 132, l. c. 138-139; Nolker v. Nolker, 226 S. W. 304;** and **Mead v. Spaulding, 94 Mo. 43.** In the latter case the Supreme Court of Missouri said:

"The written opinion of the trial court, when incorporated in the bill of exceptions, forms no part of the record, and will not take the place of instructions, and will not be looked to to ascertain how the disputed facts were found."

In the **Nolker v. Nolker** case **(226 S. W. 304)** the Court said:

"Opinions of the trial judge constitute no part of the record in the case, and consequently are not before us."

From the foregoing citations we respectfully submit that the comments of Judge Faris, appearing at pages 206-10 of the transcript, should not have been incorporated in the bill of exceptions nor in this transcript, and even though they are incorporated therein they have no proper place and under the law cannot and should not be considered.

To permit the consideration of comments and expressions of opinion announced before the rendition of a judgment would be to permit the impeachment of a judgment by collateral evidence. This has never been the rule.

Now, with the comments of Judge Faris eliminated from consideration there is absolutely nothing in the record upon which this Court could hold that the action of the trial judge on the motion for a new trial was in any manner abused. We feel that the weight of the testimony is in favor of the plaintiff. However, at worst there is a conflict in the substantial evidence sufficient to justify the overruling of a motion for a new trial on the weight of the evidence.

It is only in those cases where it is patent and apparent from the **undisputed evidence** that the verdict or judgment is for the wrong party or is improper that the appellate courts will review the discretion of the trial judge. A striking case supporting this contention is that of Val-

ler v. Irrigation Company, 248 Fed. 483 (8th Circuit). In this case the Court instructed the jury that if their finding was for the plaintiff they should return a verdict in his favor for $2,000.00, the face of the note. The jury returned a verdict for $1,000.00, upon which judgment was entered, and a motion for a new trial was overruled by the trial judge. The Appellate Court properly held that, under the undisputed evidence, the plaintiff was entitled to $2,000.00 or nothing, and that the failure of the trial judge to grant a new trial constituted a patent and manifest abuse of his legal discretion.

In the case of **Paine v. Union Stock Yards Company, 28 Fed. (2d) 463 (8th Circuit)**, the plaintiff recovered a judgment, and thereafter defendant filed its motion for a new trial, attached to which were affidavits as to additional testimony which defendant sought to offer on a new trial. The trial court overruled the motion for a new trial with this explanation:

> "If a new trial should be had and the evidence contained in the affidavits were produced and believed by the triers of fact it would doubtless result in a substantial modification of the decision."

The trial court, in the course of its opinion incident to the overruling of the motion for a new trial, further said:

> "The Court is of the opinion that it has no power or right to grant a new trial under the circumstances

here involved and makes this statement so that the defendant may have the benefit thereof on review."

The defendants contended that the memorandum indicated that the trial judge refused to exercise his discretion to grant a new trial and that therefore the Appellate Court was justified in reviewing same. In the course of the opinion (l. c. 467) the Court said:

> "The granting of a new trial is, generally speaking, within the discretion of the trial judge, and, unless that discretion patently has been abused, his ruling on a motion for a new trial is not subject to review. It is not our view, however, that in this case the trial judge refused to exercise his discretion. * * * Clearly, however, the trial court by that language did not mean to intimate that absolutely it did not have the power to grant a new trial. * * * Perhaps the learned trial judge might have reached a different conclusion, and indeed it appears that he would have liked so to have done. But he did exercise his discretion, and his action is not to be reviewed here."

In 46 Corpus Juris 177 the rule of law is stated as follows:

> "Because the trial judge would have reached a conclusion different from that of the jury, nevertheless the trial judge may yield his own opinion to that of the jury."

In the case of **Reeve v. Dennett, 137 Mass. 315**, the Court said:

"The contention of the defendant that he was entitled as a matter of law to have a new trial upon the statement of the trial judge that he was of the opinion that the verdict was against the weight of the evidence cannot be sustained. A judge has a right to set aside a verdict which, in his opinion, is against the weight of the evidence. * * * To require him, as a matter of law, to set aside every verdict which, in his opinion, is against the weight of the evidence, would result practically in the trial of the facts by the Court instead of the jury."

In the case of **Hays v. Stine**, 289 Fed. 224 (4th Circuit), the Court held:

"Where the evidence was conflicting it would have been an abuse of judicial discretion for the trial judge to have set aside the verdict of the jury."

Again, in the case of **Yellow Cab Company v. Earle**, 275 Fed. 928 (8th Circuit) (certiorari denied 258 U. S. 624), the Court said:

"Denial of a motion for a new trial on the ground that the verdict is not justified by the evidence is discretionary with the trial court and not reviewable on appeal."

The same rule of law was followed in the case of **Ellerd v. Griffith, 29 Fed. (2d) 402 (9th Circuit).**

Also in the Sixth Circuit in the case of **Gajda v. Dairy Company, 18 Fed. (2d) 279,** the Court said:

"Neither the Appellate Court nor the trial judge can rightly pass on conflicting testimony or determine the credibility or preponderance thereof."

In **Weed v. Petroleum Company, 300 Fed. 1005** (see also 294 Fed. 725, same case), it was held:

"It is not sufficient ground for a new trial that the verdict is against the weight of the evidence or that the Court may have arrived at a different result."

Also in **Stewart v. Railroad Company, 229 Fed. 862**, l. c. 863, the Court said:

"I felt at the time the verdict was rendered that the plaintiff's claim as to how the injury occurred was the correct one and that the verdict should have been the other way; yet there was a conflict in the testimony * * * and while I think the finding was wrong I find nothing to justify me in granting a new trial."

See also **Pringle v. Guild, 119 Fed. 962**, holding to the same effect.

A unique situation arose in the case of **Spiro v. Felton, 78 Fed. 578 (6th Circuit)**, in which case it appeared that the trial judge refused to grant a new trial on the ground that the verdict was against the weight of the evidence, for the reason that he was not justified in law in so doing. The Appellate Court held that the trial judge did possess the power to grant a new trial on the ground that the

verdict was against the weight of the evidence, and reversed and remanded the case in the following language:

> "We find no error in the action of the Court during the trial and only remand the case for further proceedings from the point where the error occurred, leaving it to the trial court, upon consideration of the weight of the evidence, to grant the motion for a new trial or not as in its discretion it may deem proper."

Where the evidence is conflicting the trial judge possesses a certain discretion to substitute his judgment for that of the jury and to grant a new trial on the weight of the evidence; however, he is not obliged to exercise this discretion even though he may feel that the verdict is not as he would have rendered it had he been deciding the case on the facts. And so when it comes to the matter of the trial judge substituting his judgment on keenly disputed issues of fact, in lieu of the judgment of twelve impartial men, he should proceed with great caution and give consideration to the fact that possibly the jurors were right and he is wrong. We personally might feel that the decision of a jury is wrong and contrary to the way in which we personally might have decided the same case under the same evidence, but we cannot be absolutely sure that we are right and that the jury is wrong where the evidence is conflicting. The courts have held repeatedly that disputed questions of fact, the credibility of witnesses and the weight to be given to their testimony are questions for determination by a jury, and while the

right to supervise the conduct of a jury rests with a trial judge, this is a grave responsibility which should be carefully and cautiously exercised and only in exceptional cases should a trial judge feel justified in substituting his judgment for the verdict of a jury of twelve impartial men, particularly where the evidence is conflicting and where there is substantial evidence to support the jury's findings. To require a trial judge to grant a new trial in every case in which he personally feels that the verdict of the jury is not the same as his judgment were he deciding the facts, would be tantamount to abolishing the trial of the facts by jury, contrary to the Seventh Amendment, and so the Massachusetts Court said in the case of **Reeve v. Dennett, 137 Mass. 315:**

> "To require a trial judge, as a matter of law, to set aside every verdict which, in his opinion, is against the weight of the evidence, would result practically in the trial of the facts by the Court instead of the jury."

The right to grant a new trial on the weight of the evidence is a discretion vested in a trial judge to be exercised as his conscience may dictate, and while the trial judge in the instant case may have felt that the jury did not properly weigh the testimony of certain witnesses, nevertheless, unless the trial judge was able to convince himself that the jury was positively wrong and that he was absolutely right, he should, in the exercise of a sound

judicial discretion, refuse a motion for a new trial on the weight of the evidence (where the testimony is conflicting), even though, without such mature consideration, he might be prompted to say that the verdict of the jury was not in accordance with the weight of the evidence.

We respectfully submit that Judge Faris carefully considered his decision on the motion for a new trial and that having exercised a discretion on the highly disputed and conflicting evidence of record in this case this Court will not, and should not, condemn Judge Faris of abusing a discretion with which the law vests him.

The United States Circuit Court of Appeals, in its opinion, summed up this assignment of error in the following brief but forceful language:

> "This is not a case in which the lower court arbitrarily refused to consider the motion for a new trial, but it appears from the record that after very careful and thoughtful consideration of the motion the Court denied the same."

It was not incumbent upon Judge Faris, even though he felt, under the highly disputed and conflicting evidence in this case, that the verdict was not in accordance with his liking, and was, in his opinion, against the weight of the conflicting evidence, to sustain a motion for a new trial on the weight of the evidence, but this was a discretion which he possessed and could exer-

cise if he saw fit. Having decided not to exercise this discretion he cannot be charged with abusing the same, for, as hereinabove stated, to require every trial judge to grant a motion for a new trial, on the weight of the evidence, when he felt that the verdict was against the same, would be to impair the right of trial by jury contrary to the Seventh Amendment.

We respectfully submit that the overruling of petitioner's motion for a new trial was within the sound judicial discretion of the trial judge, and therefore is not reviewable by this Court.

Conclusion.

Feeling that this case was fairly and ably tried by District Judge Faris, that there was substantial evidence upon which the case was submitted to the jury, and that the denial of the motion for a new trial is not reviewable on appeal, we respectfully submit that the writ of certiorari should be quashed and the judgment rendered in the plaintiff's favor should be affirmed and sustained.

Respectfully submitted,

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